(12)

No. 91-913

IN THE
Supreme Court of the United States
OCTOBER TERM 1991

JOHN G. PATTERSON, TRUSTEE,
Petitioner

v.

JOSEPH B. SHUMATE, JR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SUPPORTING RESPONDENT

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file a brief as *amicus curiae* in support of respondent, Joseph B. Shumate, Jr. In support of this motion, the Chamber states as follows:

1. This motion is necessitated by the refusal of counsel for the Petitioner to consent to the filing of an *amicus curiae* brief by the Chamber.
2. This Court has granted Respondent's motion to proceed in *forma pauperis* and Respondent has

consented to the Chamber's filing of the accompanying *amicus curiae* brief.

3. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 190,000 businesses and organizations and serves as the principal voice of the American business community.

4. The Chamber regularly represents the interests of its member-employers in important employee benefits, employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of employee benefits and labor relations litigation. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478 (1990); *FMC Corp. v. Holliday*, —— U.S. ——, 111 S.Ct. 403 (1990).

5. The instant case presents an issue of great significance for the Court—i.e. the right of retirement plans and retirement plan sponsors offering future retirement benefits pursuant to federally mandated spendthrift provisions to avoid disruption of the operation of such plans due to the bankruptcy of plan participants.

6. This issue is of vital concern to the Chamber and all its member-employers. Annual surveys of Chamber members reflect that most Chamber members sponsor retirement plans which will be affected by the decision in this case.[1] At the same time many Chamber members extend consumer credit as their principal business or as a significant part of their business activities.[2]

7. The Fourth Circuit's decision in the instant case and similar decisions in the Third, Sixth and Tenth Circuits confirmed that retirement benefits are excluded from the bankruptcy estate of insolvent plan participants. If this Court adopts Petitioner's rationale and treats retirement benefits as a part of an insolvent plan participant's bankruptcy estate, it will dramatically alter the operation of retirement plans and the retirement security of plan participants.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying *amicus curiae* brief in support of the Respondent, Joseph B. Shumate, Jr.

Respectfully submitted,

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[1] In the most recent Chamber survey, 84.8 percent of the Chamber members surveyed indicated that, in 1990 plan years, they made company contributions to fund the cost of providing retirement benefits. This survey included responses from 1,000 member companies who responded to the annual survey mailed to member companies who were chosen to represent a cross section of the Chamber's membership by size, industry and geographic location. More than 3.7 million employees are employed by the 1,000 companies that responded to the survey. Chamber, Employee Benefits 1991 Edition 5, 24-25 (1991).

[2] Chamber members include eight of the ten largest bank credit card lenders listed in the American Bankers Association annual survey for the year ended December 31, 1990. *The Top 25 Companies in Bank Credit Cards*, American Banker, Sept. 10, 1991, at 9A.

QUESTIONS PRESENTED

1. Do retirement plan restrictions on transfer or assignment required by Section 206(d) of the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 401(a)(13) of the Internal Revenue Code (the "I.R.C.") constitute "applicable nonbankruptcy law" as that phrase is used in Section 541(c)(2) of the Bankruptcy Code of 1978?

2. Should this court limit the availability of the protections of the spendthrift trust provision of Section 541(c)(2) of the Bankruptcy Code of 1978 in the case of debtors who are or were highly compensated employees, officers or owner-employees of the plan sponsor?

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

For brevity, the Chamber of Commerce of the United States (the "Chamber") respectfully requests that the Statement of Interest contained in the accompanying Motion for Leave to File Brief *Amicus Curiae* be incorporated into this brief by reference.

SUMMARY OF THE CASE

Joseph Shumate worked for more than 30 years for Coleman Furniture Co. ("Coleman").[1] Shumate accrued a benefit under a pension plan established by Coleman in 1963.[2] By 1971 he had completed the full 20 year period

[1] Shumate was hired at age 21 on September 5, 1951 and worked for Coleman continually until February 24, 1983, except for a military leave. J.A. Vol. I, at 14-15 & 90-91.

[2] J.A., Vol. I, at 12-13 & 90, Vol. II, at 233.

of service taken into account for purposes of the relevant pension plan benefit formula.[3]

Shumate rose through the ranks until 1979, when he purchased a controlling interest in Coleman in a leveraged buyout and became its President.[4] Shumate's management of Coleman was subject to extensive controls imposed by the bank that financed such purchase.[5] In late 1982, the venture failed and Coleman filed for Chapter 11 reorganization.[6]

In February of 1983, Shumate's tenure as President of Coleman ended.[7] In June of 1984, Mr. Shumate's personal financial burdens arising out of the failure of the leveraged buyout of Coleman forced him to seek bankruptcy protection.[8]

In 1987, the Coleman pension plan began to wind up its affairs.[9] However, the bankruptcy trustee appointed in Shumate's proceeding contested Shumate's rights to receive his pension benefits.[10]

Mr. Shumate's pension was stipulated to be worth $250,000, the estimated purchase price of an annuity contract providing Sumate with a monthly benefit of $1,603.23.[11] Because Shumate is now age 68 and un-

[3] Only 20 years of service counted towards a final average pay formula. Plan § 4.01(a), J.A., Vol. II, at 403-04. However, that formula counted Shumate's final average compensation after 1971 and service until 1981 counted towards early retirement. Plan §§ 3.03, 4.01(a) & 4.03, J.A., Vol. II, at 403-04 & 407.

[4] J.A., Vol. I, at 119-20 & 125-31; Petitioner's Brief at 5.

[5] J.A., Vol. I, at 125-31 & 158-59.

[6] J.A., Vol. I, at 13 & 90. After an eight month effort to reorganize Coleman, the bankruptcy was converted to a Chapter 7 liquidation. *Id.*

[7] J.A., Vol. I, at 14-15 & 90.

[8] J.A., Vol. I, at 18 & 90.

[9] J.A., Vol. I, at 56-83.

[10] J.A., Vol. I, at 170-177.

[11] J.A., Vol. I, at 102. Annuities must be offered when a plan terminates. 29 U.S.C. §§ 1054(g), 1055(g) & 1341 (1988); I.R.C. §§ 411(a)(11), 411(d)(6). The annuities must be nontransferable as required by ERISA Section 206(d) and I.R.C. Section 401(a)(13).

employed, it is unlikely he will be able to accumulate a meaningful retirement benefit from other employment if he is stripped of the pension he earned over his 30 years of service with Coleman.

Petitioner sought to include Shumate's retirement benefits in his bankruptcy estate on a theory that such benefits are not spendthrift trust benefits protected from such inclusion by Section 541(c)(2)[12] of the Bankruptcy Code of 1978 (the "Code").[13] The district court agreed with the petitioner's argument that the Section 541(c)(2) exclusion of spendthrift trust benefits from a bankruptcy estate is limited to spendthrift trust benefits rendered nontransferable and nonassignable under applicable state law, not benefits rendered nontransferable and nonassignable by federal law.[14]

The Fourth Circuit, relying upon its prior holding in *In re Moore*,[15] held that the plain meaning of the phrase "applicable nonbankruptcy law" in Section 541(c)(2) of the Bankruptcy Code ("Code Section 541(c)(2)") encompasses spendthrift restrictions of federal as well as state law.[16] The court below also expressly concluded that

[12] 11 U.S.C. § 541(c)(2) (1988).

[13] Pub. L. No. 95-598, 92 Stat 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1329) [hereinafter cited and generally referred to as the Code].

[14] *Creasy v. Coleman Furniture Corp.*, 83 Bankr. 404 (W.D. Va. 1988). The District Court relied upon *In re Goff*, 706 F.2d 574 (5th Cir. 1983). *See also*, *In re Daniel*, 771 F.2d 1352 (9th Cir. 1985); *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985); *In re Graham*, 726 F.2d 1268 (8th Cir. 1984). *Cf. Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982).

[15] *In re Moore*, 907 F.2d 1476, 1478-79 (4th Cir. 1990). *Accord*, *In re Harline*, 950 F.2d 669, 674-75 (10th Cir. 1991); *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991); *In re Lucas*, 924 F.2d 597, 600-02 (6th Cir. 1991); *In re Kincaid*, 917 F.2d 1162, 1169-70 (9th Cir. 1990) (concurring opinion).

[16] *Shumate v. Patterson*, 943 F.2d 362, 363-64 (4th Cir. 1991).

the restrictions on participant assignments or transfers required by Section 206(d)[17] of the Employee Retirement Income Security Act fo 1974[18] are spendthrift restrictions protected by Code Section 541(c)(2).[19]

SUMMARY OF ARGUMENT

The decision of the court below must be upheld because it interprets the provisions of Section 541(c)(2) of the Bankruptcy Code[20] in a manner which is consistent with the relevant principles of statutory interpretation recognized by this Court, including the plain meaning rule. The phrase "applicable bankruptcy law" is broad and unqualified and the same phrase is used elsewhere in the Bankruptcy Code in provisions which clearly encompass federal law. Where Congress intended to limit a provision of the Bankruptcy Code to state law, it did so expressly.

The decision below is also consistent with the legislative history of the Bankruptcy Code of 1978 when viewed against the backdrop of the history of our federal bankruptcy system. A comparison of the initial versions of that legislation and the Bankruptcy Commission Report on which they were based with the Bankruptcy Code of 1978, as finally enacted, demonstrates conclusively that Bankruptcy Code Section 522 cannot be used, as the Petitioner suggests, to vary the plain meaning of the spendthrift trust exclusion of Bankruptcy Code Section

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[17] 29 U.S.C. § 1056(d) (Supp. I 1989 & 1988).

[18] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 26 & 29 U.S.C.) [hereinafter cited and referred to as ERISA].

[19] 943 F.2d 362, 363-64. *Accord In re Harline*, 950 F.2d 669, 674-75 (10th Cir. 1991), *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991); *In re Lucas*, 924 F.2d 597, 600-02 (6th Cir. 1991); *In re Kincaid*, 917 F.2d 1162, 1169-70 (9th Cir. 1990) (concurring opinion); *In re Moore*, 907 F.2d 1476, 1479-81 (4th Cir. 1990).

[20] 11 U.S.C. § 541(c)(2) (1988).

541(c)(2). This comparison conclusively demonstrates that the Section 522 exemption for qualified plans, upon which Petitioner rests his entire analysis, was merely a dependant second step in a proposed, but unenacted two-step mechanism. As finally enacted by Congress, Section 541(c)(2) preserved the long standing spendthrift trust exclusion from the initial bankruptcy estate.

Further, the decision below is consistent with the objectives of the Bankruptcy Code of 1978, harmonizes the Bankruptcy Code with the objectives of ERISA and the I.R.C., and avoids the hardship which will be imposed upon the retirement plan system if the Petitioner's view were to prevail.

Finally, the decision below also correctly rejects the Petitioner's attempt to read into Section 541 of the Bankruptcy Code a disparate treatment of plan participants who are officers or owners of a plan sponsor. Such a distinction is inconsistent with the broad scope of Bankruptcy Code Section 541(c)(2) and engrafts new language on Section 541 in order to serve objectives which have already been adequately addressed by Congress in another manner in ERISA and the I.R.C.

ARGUMENT

I. THE NONALIENATION PROVISIONS OF ERISA AND THE I.R.C. ARE "APPLICABLE NONBANKRUPTCY LAWS" WITHIN THE MEANING OF SECTION 541(c)(2) OF THE BANKRUPTCY CODE.

A. Statutory Provision.

Code Section 541(a)(1) establishes a general rule that the bankruptcy estate includes "all legal or equitable interests of the debtor in property.[21]

Section 541(c)(2) varies this general rule of inclusion with respect to beneficial interests in property which are subject to spendthrift or other transfer restrictions:

> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable

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[21] 11 U.S.C. § 541(a)(1) (1988).

under *applicable nonbankruptcy law* is enforceable in a case under this title.[22] (emphasis added)

B. Retirement Plan Nonalienation Provisions As Spendthrift Provisions.

The court below correctly held that the provisions of Section 206(d) of ERISA and Section 401(a)(13) of the I.R.C. which require retirement plans to prohibit transfers or assignments of future retirement benefits[23] are spendthrift restrictions of "applicable nonbankruptcy law" within the meaning of Code Section 541(c)(2).[24]

In a leading preemption case, this Court expressed the view that the ERISA Section 206(d) nonalienation rule is a spendthrift restriction which is "consonant with" other federal spendthrift rules.[25]

C. The "Plain Meaning" of "Applicable Nonbankruptcy Law."

The narrow textual issue before this Court is the meaning of the phrase "applicable nonbankruptcy law."

This Court has consistently held that the most persuasive evidence of legislative intent is the plain meaning of the words of a statute.[26] At its heart, the plain

[22] 11 U.S.C. § 541(c)(2)(1988) (emphasis added).

[23] A plan must expressly prohibit assignments or transfers of plan benefits. 29 U.S.C. § 1056(d)(1)(1988); I.R.C. § 401(a)(13)(A). Plans may be funded by a trust or an insurance fund or custodial account with the essential "separate fund" characteristics of a trust. I.R.C. § 401(a); 29 U.S.C. § 1103 (1988 & Supp. I 1989). Such arrangements are deemed to constitute trusts. I.R.C. § 401(f).

[24] *Shumate v. Patterson*, 943 F.2d 362, 363-64 (4th Cir. 1991), *cert. granted*, —— U.S. ——, 112 S.Ct. 932 (1992).

[25] *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 371-72 & n.13 (1990). (ERISA Section 206(d) bar to constructive trust.) *See also* notes 81-83 *infra* & accompanying text.

[26] *Ardestani v. Immigration and Naturalization Service*, —— U.S. ——, 112 S. Ct. 515, 520 (1991). *See also, Norfolk & Western Ry. v. American Train Dispatchers Assn.*, —— U.S. ——, 111 S.Ct. 1156, 1163 (1991); *West Va. Univ. Hospitals, Inc. v. Casey*, —— U.S. ——, 111 S.Ct. 1138, 1147 (1991).

meaning doctrine calls for a textual analysis of the statutory language. However, this textual analysis is not narrowly limited to the words being construed. Rather, the plain meaning of the statute must be read in the context of the entire statute within which those words appear.[27]

On its face, the terms "applicable nonbankruptcy law" are broad and unqualified. The phrase does not refer to any specific body of state or federal law. Congress used the limiting term "state" where it intended to do so.[28] The Code contains no definition of "applicable nonbankruptcy law."[29] Nevertheless, when the same phrase is used elsewhere, it is clear that the phrase encompasses federal law.[30] This court has generally presumed that multiple uses of the same term in a single statute will have the same meaning.[31]

Thus, Code Section 541(c)(2) is unambiguous and this Court need look no further than the statute itself to conclude that Code Section 541(c)(2) protects the assets and benefits of retirement plans which are subject to nonalienation provisions required by ERISA and the I.R.C. However, the legislative history of Congressional enact-

[27] *King v. St. Vincent's Hospital*, —— U.S. ——, 112 S.Ct. 570, 574 (1991). *See also, McCarthy v. Bronson*, —— U.S. ——, 111 S.Ct. 1737, 1740 (1991).

[28] 11 U.S.C. §§ 109(c)(2), 362(b)(12), 522(b)(1), 522(b)(2), 523(a)(5), 903(1) & 1145(a) (1988 & Supp. II 1990). *See In re Moore*, 907 F.2d 1476, 1478 (4th Cir. 1990).

[29] The absence of a definition suggests strongly that the reference to "law" is not limited as to jurisdiction. This Court has followed the principle that where a statute uses an established term without providing a definition, it should be presumed that "Congress intended it to have its established meaning." *McDermott Int'l v. Wilander*, —— U.S. ——, 111 S. Ct. 807, 811 (1991).

[30] 11 U.S.C. §§ 108(a) & 1125(d) (1988). *See In re Moore*, 907 F.2d 1476, 1477-78 (4th Cir. 1990).

[31] *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983). *See, In re Moore*, 907 F.2d 1476, 1478 (4th Cir. 1990).

ment of Section 541(c)(2) also supports this interpretation.

D. Legislative History of 1978 Enactment of Section 541(c)(2).

Because of the complex history and the relative continuity of many bankruptcy practices, this Court has proceeded with special care in interpreting amendments to federal bankruptcy laws. This Court has expressed the view that such interpretations require a special attention to the past interpretations of terms and concepts that remain a part of modern bankrupcy statutes. During the current term this Court observed that:

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." . . . [T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.[32]

This principle of interpretation is directly applicable to this case.

1. *The Constitutional, Legislative, Common Law and Civil Law Antecedents to Section 541(c)(2).*

Bankruptcy systems have provided for the division of the assets of insolvent debtors among the debtors' creditors since at least 600 B.C.[33] Throughout history, bankruptcy systems rewarded "good" debtors who cooperated

[32] *Dewsnup v. Timm*, —— U.S. ——, 112 S.Ct. 773, 779 (1992).

[33] Noel, *A History of the Bankruptcy Clause of the Constitution of the United States*, 12-15, 15 n.20, 19, 21-70, 124 & 198 (undated PhD dissertation submitted to the Philosophy Faculty of Catholic Univ. of America, circa 1919) [hereinafter cited as Bankruptcy History]. Although there is evidence of a formal bankruptcy system in Athens, the Roman system bears much more resemblance to the English system upon which our federal bankruptcy system is based. *Id.*, at 12-13 & 19. *See also, Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911); *Continental Ill. Nat'l Bank v. Chicago R.I. & P. Ry.*, 294 U.S. 648, 674 (1935).

with the bankruptcy process with more lenient treatment than would be afforded "bad" debtors.[34] The leniency shown to cooperative debtors before the nineteenth century bears little resemblance to the lenience shown under modern bankruptcy statutes.[35] However, the nature of the cooperative behavior expected in exchange for lenience has changed very little. A debtor was expected to assist in the collection of his or her property and transfer of such property to an appropriate official or representative of unpaid creditors.[36]

The dividing line used to determine property includible in a bankruptcy estate is based upon this model of "good" debtor behavior. Since a debtor cannot assign or transfer assets held for his or her benefit under a trust subject to a spendthrift restriction, federal law consistently excluded such trust assets from the bankruptcy estate.[37]

Until 1841, this focus upon debtor cooperation was more important to the identification of the bankruptcy estate than it is today because prior to that year there was no provision for automatic vesting of the debtor's property rights in a receiver or trustee.[38] The Bankruptcy Acts of

[34] Bankruptcy History, *supra* note 33, at 11-12, 16-17, 19, 21, 27-29, 38, 43-44, 46-49, 51, 54-57, 61-62, 65 & 69. *See* 11 U.S.C. §§ 521 & 523(a)(3) (1988).

[35] Most early bankruptcy systems were extremely punitive. Leniency usually meant that the debtor would not be executed or become enslaved, indentured or imprisoned, Bankruptcy History, *supra* note 33, at 15-17, 19, 27-29, 38, 43-44, 46-49, 51, 54-57, 62, 65 & 69. Today, cooperation will entitle a nonfraudulent debtor to a discharge of debts not fully satisfied as a result of the division of the bankruptcy estate among the bankrupt debtors. 11 U.S.C. §§ 521 & 523(a)(3).

[36] Bankruptcy History, *supra* note 33, at 11-12, 16, 19, 28-29, 38, 48-49, 56-57, & 62.

[37] *See infra* notes 43-63 & 103-4 & accompanying text.

[38] Bankruptcy Act of 1841, § 3 ch. 9, 5 Stat. 440, 442-43. The Bankruptcy Code of 1800 did empower receivers to initiate collection actions and recover the debtor's assets in this fashion. Bankruptcy Code of 1800, § 18, ch. 19, 2 Stat. 19. The power to seize

1841, 1867, 1898 and 1938 all reduced bankruptcy trustees' procedural burdens and the administrative costs and paperwork burdens of bankruptcy by reducing the trustees' reliance upon the debtor. Under all these statutes, bankruptcy trustees automatically acquired title to whatever property the bankrupt debtor could reach.[39] Importantly, all federal bankruptcy statutes enacted since 1867 have expressly prevented this automatic title vesting rule from applying to spendthrift trusts.[40] Although debtors have not been required to participate in the formal transfer of title to property since the nineteenth century, the definition of the assets that constitute the bankruptcy estate has continued to echo the earlier era when the debtor was required to participate in formal transfer of title. Debtors are still required to cooperate and will only receive a discharge of debts if they do so.[41]

Section 70(a)(5) of the Bankruptcy Act of 1898, as in effect prior to enactment of the Code, implemented this spendthrift trust protection by including in a bankruptcy estate:

> Sec. 70. TITLE TO PROPERTY
>
> a . . . (5) property, including rights of action, which prior to the filing of the petition he *could* by any means *have transferred or* which *might have been levied upon and sold* under judicial process against him, or otherwise seized, impounded or sequestered . . . .[42] (emphasis added.) ("Act Section 70(a)(5)")

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assets of an insolvent debtor is documented as early as the reign of the English King Henry VIII in 1542. Bankruptcy History, *supra* note 33, at 21 & 23.

[39] Bankruptcy Act of 1841, § 3, ch. 9, 5 Stat. 440, 442-43; Bankruptcy Act of 1867, § 14, ch. 176, 14 Stat. 517, 522-23; Bankruptcy Act of 1898, § 70(a), ch. 541, 30 Stat. 544, 565-66; Chandler Act (Bankruptcy Act of 1938), § 70(a), ch. 575, 52 Stat. 840, 883.

[40] *Id.*

[41] 11 U.S.C. §§ 521 & 523(a)(3).

[42] Bankruptcy Act of 1898, § 70(a), ch. 541, 30 Stat. 544, 565-66, as amended by Chandler Act (Bankruptcy Act of 1938), § 70(a), ch. 575, 52 Stat. 840, 883 (emphasis added).

2. *Treatment of Retirement Plans in Bankruptcy Prior to 1978 Bankruptcy Amendments.*

In 1938, Congress enacted I.R.C. amendments which for the first time required that qualified retirement plans expressly prohibit diversion of the assets of a qualified trust for any purpose other than the provision of benefits to plan participants, until all such benefits are fully paid.[43] The Department of Treasury regulations interpreting this provision required that the plan or trust documents implementing a qualified plan:

> must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means.[44]

This requirement has remained a part of applicable Treasury regulations from 1939 until the present.[45]

In 1974, Congress adopted ERISA.[46] ERISA replaced state laws governing retirement plans and provided for a strongly worded nonalienation requirement.[47] ERISA Section 206(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[48] ERISA also amended the I.R.C. to add Section 401(a)(13) which contained similar language and codified the longstanding Treasury Department

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[43] Revenue Act of 1938, Pub. L. No. 75-554, § 165, ch. 289, 52 Stat. 447, 518.

[44] Treas. Reg. 101 under the Revenue Act of 1938, § 165-1(d) (1939). *Accord* H.R. Rep. No. 1860, 75th Cong., 3d Sess. 46 (1938).

[45] Treas. Reg. § 1.401(a)-13(b) (1988).

[46] Pub. L. No. 93-406, 88 Stat. 829 (1974).

[47] It is not necessary to resolve the issue of the extent to which state spendthrift statutes are preempted by ERISA to resolve this case. That issue need only be addressed if this Court agrees with the Petitioner that Code Section 541(c)(2) only applies to spendthrift provisions of state law.

[48] ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988).

and Internal Revenue Service interpretations of the "no diversion" rule of I.R.C. Section 401(a)(3).[49] It is clear from the preamble to ERISA [50] and the legislative history of ERISA[51] that this and the other minimum standards imposed on retirement plans by ERISA are intended to protect retirement plan benefits so that participants will actually receive the retirement benefits they have grown to expect.

During the 40 years preceding enactment of the Code, six court decisions construed Act Section 70(a)(5).[52] Four of these decisions predated ERISA.

In 1939, the Fifth Circuit held in *In re Baxter* [53] that retirement annuities that were expressly made nonassignable would not be includable in a bankrupt employee's estate because the property of the debtor was not transferable.

Two decisions reported during the 1940s held that spendthrift provisions protected retirement benefits of bankrupt employees of quasi-government agencies.[54] For example, in *TVA v. Kinzer,*[55] the Sixth Circuit held that a spendthrift provision in a retirement plan that did not satisfy the requirements for protection under applicable state law was excluded from a bankruptcy estate because

[49] I.R.C. § 401(a)(3); Treas. Reg. § 1.401(a)-13(b) (1988).

[50] ERISA § 2(a), 29 U.S.C. § 1001(a) (1988).

[51] H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 280 (1974), Ways & Means Rep., H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 28 & 66 (1974); House Labor Rep., 120 Cong. Rec. 3977, 3987 (Feb. 25, 1974).

[52] 11 U.S.C. § 110(a)(5)(1970).

[53] 104 F.2d 318 (6th Cir. 1939). *See also Seventy-First Street & Broadway Corp. v. Thome,* 157 A. 851 (N.J. 1932).

[54] *TVA v. Kinzer,* 142 F.2d 833 (6th Cir. 1944)(TVA employee); *In re McManaman,* 50 F. Supp. 869 (N.D. Ill. 1941)(Federal Reserve Board employee). There are other decisions during the pre-ERISA period, which concentrate upon whether specific provisions constitute spendthrift provisions.

[55] 142 F.2d 833 (6th Cir. 1944).

a prohibition against transfer incorporated in rules and regulations promulgated under the Tennessee Valley Authority Act [56] was deemed to have the same force and effect as the statute itself.[57]

The *TVA* decision demonstrates that the Sixth Circuit considered that nonalienation provisions required by a federal law brought pension trusts within the protection of the spendthrift trust provision of Section 70(a)(5) of the Bankruptcy Act of 1898. This result is entirely consistent with the view that the I.R.C. Section 401(a)(13) and ERISA Section 206(d) nonalienation provisions brought retirement plans within the spendthrift trust protections of bankruptcy law in existence prior to the Bankruptcy Code of 1978.

In 1974 the Eighth Circuit held that lump sum retirement plan benefits currently payable to a debtor were included in a bankruptcy estate.[58] However, this decision merely illustrates that retirement benefits cease to be protected once paid.[59]

In *In re Turpin* [60] and *In re Parker,*[61] the Fifth Circuit and the District Court for the Western District of New York interpreted ERISA mandated spendthrift provisions as restrictions on transfer, levy or seizure of the type that prevented retirement plan assets from being treated as a portion of the bankruptcy estate for purposes of Act Section 70(a)(5).

Both cases refer to another theory for excluding future retirement benefits from the bankruptcy estate, which was first enunciated in this Court's decision in *Segal v. Ro-*

[56] 16 U.S.C. § 832 *et seq.*

[57] 142 F.2d at 837.

[58] *Short v. Girand,* 507 F.2d 425 (8th Cir. 1974) (mechanical plan administration steps necessary for such disbursement had been set in motion).

[59] *Accord Velis v. Kardanis,* 949 F.2d 78, 82-83 (3d Cir. 1991).

[60] 644 F.2d 472 (5th Cir. 1981).

[61] 473 F. Supp. 746 (W.D.N.Y. 1979).

chelle.[62] *Segal* did not involve retirement benefits. However, *Segal* offered guidelines for determining when future payments would be considered "property" of the debtor includable in the bankruptcy estate. In *Segal,* the Court suggested in *dicta* that future payments are not "property" includable in a bankruptcy estate if such future payments are not "rooted in the pre-bankruptcy past" or if such future payments are "entangled with the bankrupt's ability to make an unencumbered fresh start." [63] Both *Turpin* and *Parker* concluded that retirement benefits that are payable in the future are not "property" of the debtor within the meaning of the *Segal* test.

3. *The Bankruptcy Commission's Radical Proposal.*

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States (the "Bankruptcy Commission").[64] The Bankruptcy Commission reported its recommendations in 1973.[65]

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[62] 382 U.S. 375 (1966).

[63] 382 U.S. at 380. In a subsequent decision involving accrued vacation pay, this Court ruled for the debtor based upon the *Segal* test. *Lines v. Frederick,* 400 U.S. 19, 21 (1970) (accrued vacation pay not yet paid). However, vacation pay is not protected by ERISA Section 206(d) or I.R.C. Section 401(a)(13). *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 830 (1988). Code Section 541(a) has effectively repealed the precise result in *Lines,* S. Rep. No. 95-989, 95th Cong., 2d Sess. 82 (1978). This repeal action does not adversely affect the continued usefulness of the *Segal* test in determining whether spendthrift trust property protected by I.R.C. Section 402(a)(13) and ERISA Section 206(d) is "property" for purposes of Section 541. *Id.*

[64] Pub. L. No. 91-354, 84 Stat. 468 (1970).

[65] H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Parts I & II (1973). This Court has expressed a somewhat divided opinion with respect to the usefulness of this Report as legislative history. *Kelly v. Robinson,* 479 U.S. 36, 53 (1986) (no weight). *But see U.S. v. Nordic Village, Inc.,* —— U.S. ——, —— S. Ct. —— (1992) (Stevens & Blackmun, dissenting); *Hoffman v. Conn. Dept. of Income Maintenance,* 492 U.S. 96, 111 (1989). (Stevens & Blackmun dissenting); *Northern Pipeline Construction Co. v. Marathon Pipe Line,* 458 U.S. 50, 117 (1982) (White, Burger & Powell dissenting);

In its report, the Bankruptcy Commission recommended a radical revision of the rules for determining what property is included in the bankruptcy estate. The Bankruptcy Commission recommended a two-step mechanism for determining what property of the debtor would be available for division among creditors:

> *Step One.* Virtually all property of the debtor, including beneficial interests in spendthrift trusts would be initially included in the bankruptcy estate.[66] The Bankruptcy Commission recommended spendthrift trust property be swept into the bankruptcy estate, notwithstanding the existence of exemptions.
>
> *Step Two.* In what it referred to as a "related provision," the Bankruptcy Commission recommended that bankruptcy exemptions be expanded to include a new exemption for qualified retirement plans.[67] The new exemption for qualified plans was designed as a relief valve to mitigate the hardship which could result from inclusion of retirement plan benefits in the estate.

4. *Enactment of Modified Version of the Bankruptcy Commission's Proposal.*

The House and Senate sponsors of the Bankruptcy Code of 1978 initially introduced legislation that reflected this two-step mechanism recommended by the Bankruptcy Commission.[68]

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 205 (1988). The Chamber contends that the Bankruptcy Commission's recommendations with respect to the precise issue before this Court are sufficiently relevant when combined with the subsequent action of the House and Senate to merit this Court's consideration.

[66] Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part I at 197-98 & Part II at 147-48 (1973) (Proposed Section 4-601(b)) (limited exclusion was continued if necessary for current support of the debtor).

[67] *Id.,* Part II, at 150, cmt. 5.

[68] H.R. 10792, 93d Cong., 1st Sess. (Oct. 9, 1973) (Edwards (D. Cal.) & Wiggins (R. Cal.)); H.R. 31 & H.R. 32, 94th Cong., 1st

Although the Senate Judiciary Committee reported, and the full Senate initially passed, a version of the Bill that reflected this two-step mechanism,[69] the final bill enacted by Congress restored the prior treatment of spendthrift trusts as excludable from the initial bankruptcy estate.[70]

Section 541 of the Bankruptcy Code of 1978 followed the Bankruptcy Commission's recommendation in other respects. Most property, other than beneficial interests protected by spendthrift trust provisions, was brought into the bankruptcy estate. The "relief valve" exemption proposal was enacted as Bankruptcy Code Section 522(d)(10)(E).[71]

This drastic change in the proposal assured that the second, dependent step of the mechanism proposed by the Bankruptcy Commission would have little meaning for spendthrift trusts. By accepting the exemption language of Section 522(d)(10)(E) drafted by the Bankruptcy Commission, Congress enacted a vestige of an unenacted two-part mechanism. That provision was drafted to serve as a relief valve to remove from the reach of creditors certain spendthrift trust assets that the original drafters intended to be part of the bankruptcy estate in an unenacted version of the legislation.

This restoration of pre-1978 treatment of spendthrift trusts in the drafting process of the Bankruptcy Code of

Sess. (Jan. 14, 1975) (Edwards (D. Cal.) & Wiggins (R. Cal.)); S. 2565, 93d Cong., 1st Sess. (Oct. 11, 1973) (Burdick (D. N.D.) & Cook (R., Ky.); S. 235 & S. 236, 94th Cong., 1st Sess. (Jan. 17, 1975) (Burdick (D. N.D.)).

[69] S. 2266, 95th Cong., 2d Sess. (1978) (passed in Senate Sept. 7, 1978).

[70] H.R. 8200, 95th Cong., 1st Sess. (Edwards, Butler, Seiberling, Drinan, Volkmer, Beilenson & McClory) (as reported by House Judiciary Comm.) (July 11, 1977). Statement of Floor Manager, Rep. Don Edwards (D., Cal.), during House debates concerning passage of the Conference Report, 124 Cong., Rec. 32399 (1978); *Cf.* S. 2266, 95th Cong., 1st Sess. (DeConcini & Wallop) (Oct. 31, 1977).

[71] 11 U.S.C. § 522(d)(10)(E) (1988).

1978 demonstrates conclusively that retirement plans which qualify as spendthrift trusts are not intended to be part of the bankruptcy estate, notwithstanding the language of Section 522(d)(10)(E).

While there are a few references to the phrase "applicable nonbankruptcy law" in other expressions of legislative history, most such references simply repeat the statutory phrase.[72] However, when the Committees and floor managers of the Bill intended to speak only of state law, they did so.[73] The one reference to state law in conjunction with descriptions of new Section 541 is best interpreted as an illustration of laws included and not an implied exclusion of laws not mentioned.[74] In addition, the Bankruptcy Commission's reference to the relatedness of the qualified plan exemption to its proposal to include spendthrift trusts in a bankruptcy estate[75] makes it clear that the Bankruptcy Commission believed that the reference to "applicable nonbankruptcy law" included a reference to ERISA and I.R.C. nonalienation restrictions.

E. 1984 ERISA Reenactment of Nonalienation.

Congress amended and reenacted ERISA Section 206(d) and I.R.C. Section 401(a)(13) in 1984 to provide a special rule for qualified domestic relations orders.[76] In discussing

[72] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 83, 95th Cong., 2d Sess. (1978).

[73] *E.g.*, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 38, 47 & 274-75 (1977); S. Rep. 95-989, 95th Cong., 2d Sess. 6, 51, 74 & 110 (1978); 123 Cong. Rec. 35,452 (1977) (Statement of Rep. Drinan (D. Mass.) regarding bankruptcy exemptions).

[74] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 176 (1977).

[75] Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part II, at 150, cmt.5 (1973).

[76] Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of 26 & 29 U.S.C.). Because of uncertainties regarding the extent of ERISA preemption of state laws governing the division of family assets and family support obligations Congress adopted a limited exception to the nonalienation rules to accommodate reasonable state interests without unduly burdening retirement plans.

this legislation, one of the floor managers in the House, Congressman John Erlenborn, stated that Congress intended to adopt only a limited exception to the nonalienation rule.[77]

F. Petitioner's Interpretation of Section 541(c)(2) is Without Merit.

The Petitioner's view that the Code Section 522(d)(10)(E) exemption for qualified plans adversely affects the availability of Code Section 541(c)(2) protection was first expressed in the *Goff*[78] decision. However, *Goff* did not address the impact of Section 206(d) of ERISA. The *Goff* court purported to concede the validity of bankruptcy exemptions for amounts exempt from garnishment under a limited number of federal statutory nonalienation provisions, but excluded ERISA Section 206(d) and I.R.C. Section 401(a)(13) from the list of those statutes.[79] Recently, this Court pointedly described ERISA Section 206(d) as "consonant with other statutory provisions designed to safeguard retirement income" which the Court then identified in a footnote.[80] The list of federal anti-garnishment statutes contained in that footnote is identical to the *Goff* list.[81]

More importantly, the Petitioner's argument fails to justify abandonment of the plain meaning of Section 541. The Petitioner wholly fails to address the fact that the Section 522(d)(10)(E) qualified plan exemption is a vestige of an unenacted two-part mechanism proposed by the Bankruptcy Commission.

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[77] 130 Cong. Rec. H4251-52 (May 22, 1984) (Statement of Rep. Erlenborn (R., Ill.)).

[78] *In re Goff*, 706 F.2d 574 (5th Cir. 1983).

[79] 706 F.2d at 583.

[80] *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 371-72 & n.13 (1990).

[81] 706 F.2d at 583.

II. EXCLUSION OF RETIREMENT PLAN ASSETS AND BENEFITS FROM THE BANKRUPTCY ESTATE IS CONSISTENT WITH THE OBJECTIVES OF THE BANKRUPTCY CODE AND HARMONIZES THE BANKRUPTCY CODE WITH THE OBJECTIVES OF ERISA AND THE I.R.C.

Future retirement benefits are "entangled with the bankrupt's ability to make an unencumbered fresh start."[82] This Court should reaffirm the traditional harmony between national retirement policy and national bankruptcy policy by affirming the decision below. Such a ruling will make it clear to creditors that they should not expect the windfall of access to a debtor's retirement benefits. The Chamber contends that creditors currently have no such expectation. A ruling by this Court which focuses upon the absence of reasonable creditor expectations would be an appropriate reformulation and clarification of the two-part *Segal* test of whether future retirement benefits are "rooted in the pre-bankruptcy past."[83]

A. National Retirement Policy Objectives of I.R.C. and ERISA.

Surveys of personal bankruptcies in 1981 and 1989 illustrate that about two-thirds of the surveyed households were before the Bankruptcy Court because of extraordinary expenses or the interruption of income due to job loss, excessive medical expenses associated with serious illness, or separation or divorce.[84]

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[82] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). *See supra* note 63 for a discussion regarding the limited usefulness of the *Segal* test following enactment of Code Section 541.

[83] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966); *See* notes 60-63 *supra* & note 92 *infra* & accompanying text.

[84] *Compare The Bankruptcy Jungle*, 79 Credit World 24, 26 (March/April 1991) (report of Visa/U.S.A. 1989 Bankruptcy Survey) *with* Warren, *A Growing Army of Bankrupts*, 79 Credit World 18, 20 (Sept/Oct. 1990) (report of in depth National Science Foundation study of 2,200 consumer bankruptcies in Southern California in 1981).

The picture that emerges is one of industrious, honest, middle-class Americans who have been caught up in major shifts in the economy or who have suffered personal hardships beyond their capacities. Where significant retirement assets are at stake, these debtors have worked long enough to accumulate vested benefits. By and large, they are older than bankrupt debtors without retirement benefits. Many may be close to retirement.

Retirement benefits are designed to replace wages during the debtor's retirement years. A typical retiree may expect to live for a period 15 to 20 years with diminished income.[85] When honest, hardworking debtors face financial difficulties, their instincts are to pay their creditors at all costs. Many retirement plan participants would use their qualified plan savings for this purpose if they could. But that is not what qualified retirement plans are all about.

Employer-sponsored retirement plans are the product of an historic partnership between the public and the private sectors. The tax policies favoring such plans represent one of the finest examples of successful domestic policy implementation.[86] Our national retirement policy, as embodied in ERISA and the I.R.C. is designed to reduce the burdens of government by encouraging employers to pay for the retirement living costs of their former employees.[87] This incentive has worked well because it

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[85] *See* Atchley, *The Sociology of Retirement* 74-86 (1976); Chen, *Economic Status of the Aging*, in *Handbook of Aging and the Social Sciences* 641-65 (1985); Crystal, *America's Old Age Crisis* 51-58 (1982). *See also* Treas. Reg. § 1.72.9, Table 1 (1986).

[86] *See Public Policy & Private Pension Programs—A Report to the President on Private Employee Retirement Plans* 2 (1965) [hereinafter cited as President's Report I]; President's Commission on Pension Policy, *Working Papers; Income Security Programs; Past, Present and Future* 3-33 & 51 (Oct. 1980) [hereinafter cited as Past, Present & Future].

[87] Prior to ERISA, private plans were viewed as a supplement to the modest benefits available through Social Security, President's Report I, *supra* note 86; Berstein, *The Future of Private Pensions* 150 & 155-57 (1964); McGill, *Preservation of Pension Bene-*

gives focus to employers' natural instincts of gratitude and obligation to those who have provided faithful service.

The nonalienation provision of I.R.C. Section 401(a)(13) assures that the tax incentives extended to qualified plans achieve the intended purpose. The Internal Revenue Service has interpreted the nonalienation rule as requiring imposition of the Draconian penalty of plan disqualification where a plan complies with a demand by a bankruptcy trustee to turn over plan assets held for the benefit of a bankrupt plan participant.[88] This policy judgment was reconfirmed in 1974 when a similar spendthrift requirement was included in ERISA Section 206(d).

At the time ERISA was adopted there was no basis for serious concern that bankruptcy law would conflict with this mandatory plan design feature.[89] Creditors are aware that retirement benefits are subject to nonalienation restrictions. Because of such restrictions, creditors simply have had no history of reliance upon retirement assets as a source for repayment of debts.[90]

B. Role of Retirement Benefits in Bankruptcy Policy.

Bankruptcy courts have traditionally respected the nonalienation rules applicable to retirement benefits.

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fit Rights 36 & 63 (1973). For more recent confirmation of this national retirement policy, *see* President's Commission on Pension Policy, *Final Report* (Feb. 1981); *President's Commission on Pension Policy, Working Papers: In-Kind Benefit Programs and Retirement Income* 9-40 (Oct. 1980); President's Commission on Pension Policy, *Working Papers: Income of the Retired—Levels and Sources* 27-70 (Oct. 1980); *Past, Present & Future, supra* note 86, at 3-33 & 37-41; President's Commission on Pension Policy, *Working Papers; Retirement Income Goals* 31-34 & 49-50 (March 1980); President's Commission on Pension Policy, *Working Papers: Universal Private Pension Coverage* 8-9 (March 1980); EBRI, *The Changing Profile of Pensions* xxv, 3-6 & 165 (1985).

[88] Cf. Priv. Ltr. Rul. 8131020, CCH Pens. Plan Guide, at ¶ 17 373B (1981), (Chapter 13 proceeding). *But see, Central States Health & Welfare Pension Fund v. Stephenson*, 41 Bankr. 893 (D.S.C. 1984).

[89] *See* notes 43-63 *supra* & accompanying text.

[90] *See* notes 93-104 *infra* & accompanying text.

This harmony between bankruptcy law and the I.R.C. and ERISA nonalienation rules also served the national policy objectives of the Bankruptcy Code. From the earliest days of our republic it has been clear that the first and most basic policy of bankruptcy is to provide debtors who have not defrauded creditors with a "fresh start." [91] This purpose is well served if the debtor's qualified retirement plan assets remain intact. Most employees can only accumulate sufficient retirement assets during a whole career of retirement savings. If retirement assets can be stripped away in personal bankruptcies, many workers will be condemned to employment dependency well past age 65.

Another major policy objective of the Bankruptcy Code is addressed by the second element of the *Segal* test. If a future right to property is "rooted in the pre-bankruptcy past," [92] then creditors may be said to have a reasonable expectation of access to such property in bankruptcy. The Chamber recommends that this Court reformulate this element of the Segal test as a "reasonable creditor expectation" test. Stated in another way, the Bankruptcy Code should protect the reasonable expectation of creditors regarding the repayment of the debts, to the extent available assets permit such protection. As described above, permitting creditors to reach retirement plan assets would result in a windfall beyond the expectation of reasonable lenders.

Modern consumer credit practices have evolved over the past 75 years.[93] Over that period the consumer credit

[91] The Constitution granted Congress the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.' Art. I, § 8, cl. iv. This provision and the commentary in the Federalist Papers have been construed as evidence that "relief from debt was considered important and desirable in that early and undeveloped stage of our country's commerce." Bankruptcy History, *supra* note 33, at 6.

[92] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). *See* notes 61-63 & 82-83 *supra* & accompaning text.

[93] For description of consumer finance practices before enactment of the Code, *see* National Consumer Finance Ass'n, *The Consumer Finance Industry* 3 (1962) (origins and evolution of consumer finance industry from 1916 to early 1960's) [hereinafter cited as Finance Industry I]. See also, Chapman & Shay. *The Consumer Finance Industry* 2, 3, 14 & 15 (1967) (post World War II through mid 1960's) [hereinafter cited as Finance Industry II]; Hayes, *Bank Lending Policies* 32-49 (1977) (1950 through mid 1970's) [hereinafter cited as Lending Policies].

industry has grown to rely upon risk management safeguards that place little or no reliance upon retirement benefits as a source of repayment of loans. Consumer credit consists of secured purchase money credit, unsecured noninstallment credit and unsecured installment credit.[94]

Creditors with valid purchase money security interests may continue to assert their claims despite the power of bankruptcy trustees to avoid most other liens or security interests.[95] Purchase of personal property such as automobiles, large appliances and furniture are often handled in this fashion.[96] The purchaser often makes a significant down payment which improves the chances that the collateral will be sufficient.[97] Thus, secured purchase

[94] Federal Reserve, *Banking and Monetary Statistics: 1941-1970*, 1053-76 (1976) [hereinafter cited as Federal Reserve Statistics]; Redding & Knight, *Dun & Bradstreet Handbook of Credits and Collections*, 8-10 (1974) [hereinafter cited as Dun & Bradstreet Handbook]. Unique credit arrangements which do not fit these categories are not significant components of consumer credit.

[95] Creditors with such security interests may assert such claim to obtain a preferential recovery of their debts out of the proceeds of the sale of such property in bankruptcy. 11 U.S.C. §§ 506(a) & 552 (1988).

[96] Purchase money credit also includes mortgage loans.

[97] Conard, *The Behavior of Interest Rates* 25-27 (1966); G. Weil, *The Consumer's Guide to Banks* 157-59 (1975). Mortgage-loans ordinarily bear a lower rate of interest than personal property purchase money credit because real estate cannot be moved and because it is less likely to depreciate as much as personal property. *Cf.* Holmes & Shedd, *Practical Guide to the Law of Secured Lending* 5-7 (1986); Vidger, *Borrowing and Lending on Residential Property* 35-36 (1981). Local government title registration systems protect a diligent mortgage lender against

money lending practices demonstrate that creditors extending such credit do not rely upon a debtor's future retirement benefits as a potential source of repayment of such debt.

Noninstallment debt is usually unsecured.[98] With the exception of term loans from banks and other lenders, such credit primarily consists of charge cards, retail charge accounts and service credit.[99] Noninstallment debt, other than bank and other term loans, usually involves a 30-day repayment obligation.[100] Thus, the short term nature of such noninstallment debt disproves any contention that creditors extending such credit rely upon future retirement benefits as a source of payment.

Other than term loans, the only category of unsecured consumer credit which is designed to be in place over an extended period of time is installment debt. Unsecured installment debt consists of credit card and retail revolving charge accounts.[101] Of these, only term loans are extended by lenders with significant personal exposure to the debtor.[102] The high interest rates charged on credit card balances are intended to compensate the institutions extending such credit in advance for the risks of default, which are viewed as merely a cost of doing business.[103]

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fraudulent sales of the property. Automobile registration systems offer similar protection but the risk of rapid loss of value due to depreciation, uninsured damage or theft require that lenders require faster repayment and a higher interest rate.

[98] *See generally* Finance Industry II, *supra* note 93, at 23.

[99] Federal Reserve Statistics, *supra* note 94, at 1054-56, 1072-76 & 1081; Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[100] Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[101] Federal Reserve Statistics, *supra* note 94, at 1054-69 & 1081; Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[102] Term loans are often limited to existing customers. This familiarity leads to greater creditor confidence. As a result, such loans bear a lower rate of interest than credit cards and revolving charge accounts. *See* Taylor, *Consumer Lending* 142-45 (1983).

[103] Schweikert, *Encyclopedia of American Business History and Biography: Banking and Finance 1913-1989*, at 66-68 (1990);

The risk management practices of banks extending term loans and of credit card lenders are very similar and place an emphasis on factors unrelated to the future retirement benefit entitlements of borrowers. These lending practices stress income, liquid assets and personal factors that have been found to be good predictors of timely repayment.[104] Little or no attention is devoted to future assets or future income such as retirement benefits. Creditors just do not rely upon retirement plan assets in extending credit unless such benefits are already in pay status.

C. Harm Caused by Recent Creditor Efforts to Reach Retirement Benefits.

Despite a history of harmony between national retirement policy and national bankruptcy policy, serious concerns have arisen among the Chamber's members as a result of recent attempts of aggressive creditors to capture just such a windfall. Creditors were encouraged in this effort by the 1983 *Goff* decision.[105] Creditors have often failed in these efforts. But they have won enough judicial skirmishes that they have confused the state of the law and encouraged other creditors to make similar claims. The result has been an explosion of new creditor claims in the past two to five years. In fact, one of the Chamber's member companies maintains a qualified re-

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Lending Policies, *supra* note 93; Sullivan & Worden, *Value Creating in a Credit Card Portfolio*, 13 J. of Retail Banking 19 (Summer 1991); Sullivan & Worden, *Bankruptcy in a Bank Credit Card Portfolio*, 13 J. of Retail Banking 33 (Winter 1991); Gullo, *Back-Office Costs Pinching Banks' Credit Card Profits*, American Banker, at 1 & 3 (Nov. 22, 1991); Kantrow, *Problems Aside, Credit Cards Retain Luster*, American Banker, at 1 & 6 (May 2, 1991). *Cf.* Lending Policies, *supra* note 93, at 181-82.

[104] Lending Policies, *supra* note 93, at 181-96. *See also*, Seder, *Credit And Collections* 26-37 (1977) (credit evaluation factors); Chandler & Parker, *Predictive Value of Credit Bureau Reports*, 11 J. Retail Banking 47 (1989); Overstreet & Kemp, *Managerial Control on Credit Scoring Systems*, 8 J. Retail Banking 79 (1986).

[105] *In re Goff*, 706 F.2d 574 (5th Cir. 1983).

tirement plan that is now facing 85 bankruptcy cases in which creditors of plan participants are seeking to recover plan assets. If this trend continues, such claims will represent a serious and costly administrative burden for plans, plan sponsors and the bankruptcy courts.[106]

National retirement policy assumes that participants will accumulate retirement benefits from three sources, Social Security, employer sponsored retirement plans and personal savings.[107] Social Security only provides a minimal safety net. Since 1942, nondiscrimination limitations were imposed to assure that private retirement plans operate for the benefit of lower paid employees.[108] These nondiscrimination rules have been made progressively more stringent over the intervening years.[109]

Throughout this period it was also recognized that the combination of Social Security and employer sponsored plans would be insufficient to meet the retirement needs of mose employees.[110] It was recognized that retirement security also would require personal savings.[111] This

[106] Because of the threat of disqualification, plans must resist creditor claims. For example, one Chamber member has estimated that a plan disqualification which could result if it cooperated with the efforts of bankruptcy trustees to reach pension assets would cost over $32 million per year in additional corporate income taxes and would trigger income taxation of the earnings on the plan's assets. The plan has assets valued at $7 billion and its annual earnings average almost $750 million. The plan sponsor is contesting efforts of a bankruptcy trustee in the Eastern District of Missouri to reach benefits payable 29 years in the future. Even if the bankruptcy trustee prevails, creditors may not gain anything. The pension remains subject to loss if the participant dies before benefits are paid.

[107] *Supra* notes 86-87 & accompanying text.

[108] H.R. Rep. No. 2333, 77th Cong., 2d Sess. 50-51 (1942); Hearings on Revenue Revision of 1942 Before House Comm. on Ways and Means, 77th Cong., 2d Sess. Pt. I at 1004-05 (1942).

[109] *E.g.*, Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[110] *Supra* notes 86-87 & accompanying test.

[111] *Supra* notes 86-87 & accompanying text.

"three legged stool" approach has been reexamined repeatedly during the intervening years and has been repeatedly reconfirmed.[112]

A working man or woman who experiences bankruptcy will emerge without personal savings. If the debtor is young without significant Social Security credits or employer sponsored benefits, he or she may still accumulate such credits and benefits through years of diligent efforts. However, an older worker without a significant future period of strength, energy and good health will simply be unable to replace either of the two remaining minimum components of his or her retirement income. For this reason both Social Security benefits and employer sponsored retirement benefits have long been viewed as excluded from the estate of a bankrupt debtor. This permits debtors to rely upon receiving a future income when they can no longer work. This assures that debtors who have accumulated credits under retirement plans will not have to depend upon public assistance or other assistance for the aged or infirm.

III. THERE IS NO BASIS FOR DENYING BANKRUPTCY CODE SECTION 541(c)(2) PROTECTION ON ACCOUNT OF A PLAN PARTICIPANT'S COMPENSATION LEVEL OR STATUS.

There is no basis in Section 541 of the Bankruptcy Code of 1978 to treat bankrupt debtors less favorably based upon their pre-bankruptcy status or earnings, or based upon the extent of their post-bankruptcy needs. This silence is particularly important because prior to enacting Section 541 in its present form Congress considered a proposed version of that Section which would have limited the spendthrift trust exclusion to amounts which are necessary.[113]

[112] *Supra* notes 86-87 & accompanying text.

[113] *Compare*, Code § 541(c)(2) with S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, (1978) *and* Report of Commission on Bankruptcy

There are already strict I.R.C. contribution and benefit limitations applicable to highly compensated employees and officers or owners of a plan sponsor.[114] Other provisions of the IRS impose strict nondiscrimination rules on qualified retirement plans.[115] Retirement plans which do not take advantage of the tax advantages of the qualification rules may be designed to favor highly paid employees, officers or business owners. However, these plans, referred to as nonqualified deferred compensation plans and excess plans, do not benefit from the protection of the nonalienation provisions of I.R.C. Section 401(a)(13) or ERISA Section 206(d).[116] Thus, by operation of the I.R.C., Congress has already limited the availability of the Section 541 spendthrift trust protections to highly compensated employees, officers and owners of plan sponsors.

This Court should not read into Section 541 a provision Congress considered and rejected in order to impose new limits on the availability of Section 541 to highly paid employees, officers and owners when Congress has chosen another mechanism for achieving the same objective.

Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part II, 147-48 (Proposed Section 4-610(b)).

[114] *E.g.*, I.R.C. §§ 401(k), 401(m), 415 & 416.

[115] *E.g.*, I.R.C. §§ 401(a)(4), 401(a)(5), 401(k), 401(m) & 416.

[116] Such plans are not qualified plans subject to I.R.C. Section 401 and are expressly exempt from coverage under Part 2 of ERISA, including ERISA Section 206(d), 29 U.S.C. § 1056(d) (1988). ERISA §§ 4(b)(5) & 201(2), 29 U.S.C. §§ 1003(b)(5) & 1051(2)(1988).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

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